In the Circuit Court of Wheeling, Virginia.

HAWLEY *vs.* BALTIMORE AND OHIO RAILROAD COMPANY.[1]

1. When an employee enters into the service of a railroad company, he assumes the risks incident to such employment, such as the carelessness or unskillfulness of his co-employees, when they were skilful and careful at the time of their employment.
2. In the selection of servants the company is bound, in such case, only to the extent of care which prudent men ordinarily exercise.
3. When a company is responsible for neglect or carelessness of co-employee.

Hawley was conductor of a train in the service of the company, and running between Wheeling and Benwood. In entering the Benwood junction, a side-switch was left open by the carelessness of a switch tender, or of a conductor of the regulating engine, by reason of which the train under the conduction of the plaintiff ran off of its proper track on to the siding, and came in collision with a train thereon, whereby the plaintiff was seriously and dangerously injured.

Good and *Russell*, for plaintiff.

Wheate and *Hunter*, for defendant.

Instructions were asked by the counsel for the defendant, which the court declined to give, but gave the following instructions, which were acquiesced in by the counsel for defendant, but objected to by the counsel for plaintiff.

THOMPSON, J.—1st. The railroad company is responsible for care, such care as prudent men ordinarily exercise in their own affairs, in the selection of careful and skilful servants or employees, fitted for the various employments each is to fill.

2d. If the employees connected with the accident or collision, which resulted in the injury to the plaintiff, were actually careful and skilful at the time of their selection by the company for the duties respectively assigned them, this fulfills the obligation of the company in selecting such employees.

3d. When an employee enters into a contract of hiring with such a company, he assumes, with such relation to the company, the

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natural or ordinary risks incident to such employment, and among these, such as arise from the carelessness or unskillfulness of his fellow employees in and about the business of their common employment, when such co-employees have been selected as first aforesaid, but except as hereinafter limited and enlarged.

4th. If the plaintiff was injured by the carelessness or neglect of Michael Connor, alleged to have been the switch-tender at the point where the collision and injury occurred, and as such was a co-employee with the plaintiff, placed there to discharge a particular duty assigned him, the neglect of which occasioned the injury complained of, yet, if the plaintiff knew, or had a reasonable opportunity of informing himself of any general carelessness or unskillfulness of his said co-employee in and about this special duty, and this special duty was connected with the special employment of the plaintiff, and the plaintiff continued in the service of the company thereafter, he is to be presumed, by remaining in such employment, in the absence of any notice of such carelessness or unskillfulness to the company, or its officer having the power of removal, to have assumed the risk arising therefrom.

This instruction applies to the case of Shingleton, another co-employee, (whose duty was claimed, in regard to the negligence complained of, as identical with that of Connor) substituting Shingleton's name for that of Connor.

5th. If the jury are satisfied that Connor, the co-employee whose neglect is complained of as having been the cause of the collision which occasioned the injury to the plaintiff, had been selected with due care by the company, and it was a part of his duty to attend the switch in question, but he was careless in the discharge of his said duty, and that the officer of the company having the power of removal had notice of this neglect of duty, and neglected to remove him, and that the collision in this instance occurred so soon thereafter that the plaintiff cannot reasonably be presumed to have adopted the risk of continuing his employment with this co-employee, then the company is responsible for such neglect of duty by said employee, provided the company is not excused under other instructions hereinbefore or hereinafter given to the jury. But, if the company used

due care in selecting Connor, and had no notice of such carelessness, if such existed; or if he was careless of that duty, so assigned him, and this carelessness was known to the plaintiff, and he continued in his employment; or if only during their common employment Connor became careless, and his superior officer, as aforesaid, was informed thereof, and neglected to remove him, and the plaintiff, with notice thereof, continued his employment, under circumstances that it may reasonably be presumed that he continued his employment notwithstanding such neglect; or, if after such notice given and a refusal by the said superior officer to discharge this employee, the plaintiff, with knowledge thereof, continued his employment, he must be presumed to have adopted such employment with such risk, and is without remedy against the company.

This instruction applies to the instance of Shingleton *mutatis mutandis*.

6th. Such employees are engaged in a common undertaking in which the safety of all depends on the care and skill with which each one shall perform his appropriate function, office, or duty, and each is bound to the careful and skillful discharge of his several employment, and if the plaintiff, by his violation of the general instructions prescribed by the company for regulating his conduct, and of which he had had reasonable opportunities of obtaining a knowledge, or of which he had actual knowledge; or, in violation of specific instructions directly communicated to him by one having authority, and whom, under the circumstances, it was his duty to recognize as having such authority, and the company has furnished the means of executing any such instructions, as aforesaid; or, by any neglect of general duty incident to his employment, or unskillfulness on his part in the exercise of his employment, he contributed to his own injury, he is without remedy against the company.

7th. If the jury are satisfied that the plaintiff was not in his proper place at the time of the collision, and that if he had been in his proper place he should have had a light with him, and that by being there so equipped he could, by the exercise of ordinary prudence and the ordinary skill requisite for his employment, have prevented the collision or escaped the injury to himself, then the company is not responsible.